

Law Offices Of Polacheck & Associates, P.C.
BY: RICHARD A. POLACHEK, ESQUIRE
ATTORNEY FOR DEFENDANT, **JOHN JAVICK**
IDENTIFICATION NO. 35283
PHOENIX PLAZA
22 EAST UNION STREET, SUITE 600
WILKES-BARRE, PA 18701-2723
(570) 822-8515 FAX (570) 822-5748

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KARLA HIMLIN,	:	No. 3:10-cv-00746
PLAINTIFF	:	CIVIL ACTION - LAW
	:	JURY TRIAL DEMANDED
V.	:	
	:	(Judge Thomas I. Vanaskie)
JOHN JAVICK, JOSEPH HOINSKI,	:	(Magistrate Judge Thomas M. Blewitt)
and KEVIN BRENNAN,	:	
DEFENDANTS	:	ELECTRONICALLY FILED

**BRIEF OF DEFENDANT, JOHN JAVICK, IN SUPPORT OF MOTION
TO DISMISS THE COMPLAINT OF PLAINTIFF, KARLA HIMLIN**

NOW COMES Defendant, JOHN JAVICK, by and through his counsel,
Polacheck & Associates, P.C., by Richard A. Polacheck, Esquire, and files the
following Brief in support his Motion to Dismiss the Complaint of Plaintiff, KARLA

HIMLIN, pursuant to F.R.C.P. 12(b)(6), for failure to state a claim upon which relief can be granted:

I. PROCEDURAL HISTORY

This action was commenced by the filing of a Complaint by Plaintiff, KARLA HIMLIN, on or about April 8, 2010, in U.S. District Court for the Middle District of Pennsylvania, which Complaint identifies John Javick, 8 Michelle Street, Plains, Pennsylvania, as a Defendant in its caption and as a party in Paragraph 4 of the Complaint. A true and correct copy of the Complaint filed by Plaintiff, KARLA HIMLIN, has been attached as Exhibit "A" to the Motion to Dismiss filed by Defendant, JOHN JAVICK.

II. STATEMENT OF FACTS

The Complaint filed by Plaintiff, KARLA HIMLIN, alleges that on or about June 25, 2008, she was in her yard speaking with her son when Defendant, JOHN JAVICK, was driving on an access road behind her property. Mr. Javick asked her if she was speaking to him, to which she replied "No, get out of here.". About 10 minutes later, Defendant, JOSEPH HOINSKI, drove down the access road and was

also told to leave by Ms. Himlin. Mr. Hoinski told her the police would be called and about 10 minutes after that Officer Brennan came to question Ms. Himlin about the incident with Mr. Javick and Mr. Hoinski.

Ms. Himlin was issued a citation for Disorderly Conduct, 18 P.S. §5503(a)(3). According to this citation, Ms. Himlin had used obscene language directed towards the victim. Ms. Himlin pled not guilty to this charge and was found not guilty after a hearing on November 17, 2008.

III. STATEMENT OF QUESTIONS INVOLVED

Question: **Should Defendant, JOHN JAVICK, be dismissed as party Defendant in this matter?**

Suggested Answer: *In the affirmative.*

IV. ARGUMENT

The Complaint filed by Plaintiff, KARLA HIMLIN, does not assert any allegations against Defendant, JOHN JAVICK, but rather, consists of two (2) Counts asserted against Co-Defendant, KEVIN BRENNAN, only.

Despite listing John Javick as a Defendant in the caption of the Complaint and as a party in Paragraph 4 of the Complaint, Plaintiff, KARLA HIMLIN, has not moved forward with any allegations or averments against Defendant, JOHN JAVICK, within the Complaint. There are no allegations of fact or contentions of liability being asserted against Defendant, JOHN JAVICK, and thus, a defense cannot be prepared.

Relief should be granted under Federal Rule of Civil Procedure 12(b)(6) and the Plaintiff's Complaint should be dismissed against Defendant, JOHN JAVICK.

Moreover, this Motion to Dismiss filed on behalf of Defendant, JOHN JAVICK, is consistent with the Order of this Honorable Court dated 04/08/2010 wherein the Court has noted that it finds no claims asserted against Defendant, JOHN JAVICK, in Count I and II of Plaintiff's Complaint; that Mr. Javick's personal involvement in any alleged violation of Plaintiff's constitutional rights does not appear to have been sufficiently stated; that Defendant, JOHN JAVICK, is not a state actor and only those who act under color of state law are liable to suit under §1983, and; that the Plaintiff seems to be alleging that Mr. Javick was a part of a conspiracy

under §1985(3), but that the Court finds that Plaintiff has not properly alleged such conspiracy. A true and correct copy of the Order of Court dated 04/08/2010 has been attached to as Exhibit "B" to Defendant's Motion.

V. CONCLUSION

_____ As there are no allegations of fact or contentions of liability being asserted against him, Defendant, JOHN JAVICK, should be dismissed from this cause of action, with prejudice, for failure to state a claim upon which relief can be granted.

It is respectfully requested that this Honorable Court enter an Order granting the Motion of Defendant, JOHN JAVICK, to Dismiss Plaintiff's Complaint and further, dismissing Defendant, JOHN JAVICK, from this matter with prejudice.

Respectfully submitted,

POLACHEK & ASSOCIATES, P.C.
/s/ RICHARD A. POLACHEK, ESQUIRE
RICHARD A. POLACHEK, ESQUIRE
Counsel for Defendant, John Javick
PA I.D. Number 35283
22 East Union Street, Suite 600
Wilkes-Barre, PA 18701-2723
(570) 822-8515; (570) 822-5748 [fax]
PolacheckLaw@epix.net

CERTIFICATE OF SERVICE

I, Richard A. Polacheck, Esquire, hereby certify that on 05/17/2010 the foregoing *Brief of Defendant, JOHN JAVICK, in Support of Motion to Dismiss Complaint of Plaintiff, KARLA HIMLIN*, was filed electronically with the Court using the CM/ECF system which will send notification of such filing to the following:

Barry H. Dyller, Esquire
Kelly A. Bray, Esquire
Dyller Law Firm
Counsel for Karla Himlin
Gettysburg House
88 North Franklin Street
Wilkes-Barre, PA 18701

Rolf E. Kroll, Esquire
Margolis Edelstein
Counsel for Joseph Hoinski
3510 Trindle Road
P.O. Box 932
Camp Hill, PA 17011

John G. Dean, Esquire
Paula L. Radick, Esquire
Elliott, Greenleaf & Dean
Counsel for Kevin Brennan
201 Penn Avenue
Suite 202
Scranton, PA 18503

POLACHEK & ASSOCIATES, P.C.
/s/ RICHARD A. POLACHEK, ESQUIRE
RICHARD A. POLACHEK, ESQUIRE
Counsel for Defendant, John Javick
PA I.D. Number 35283
22 East Union Street, Suite 600
Wilkes-Barre, PA 18701-2723
(570) 822-8515; (570) 822-5748 [fax]
PolacheckLaw@epix.net